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IN THE

Supreme Court of the United States

October Term, 1962

No. 640

SWANEE PAPER CORPORATION,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

SWANEE PAPER CORPORATION (hereinafter referred to as "Swanee"), petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Clark, Magruder & Moore, Circuit Judges) entered on August 3, 1961, modifying a cease and desist order of the Federal Trade Commission.

Citations to Opinions Below

The initial decision of the Hearing Examiner of the Federal Trade Commission is unreported and is printed at Cir. A. 19a-47a.* The decision of the Federal Trade Commission, adopting, without opinion, the Hearing Examiner's initial decision as its own is unreported and is printed at Cir. A. 48a. The opinion in the Court of Appeals, reported at 291 F. 2d 833 (2nd Cir. 1961) is printed in the Appendix hereto (A1-A10).

Jurisdiction

The final decree of the Court of Appeals was made and entered on August 3, 1961 (A23-A25). An order was made by Mr. Justice Harlan on November 2, 1961 extending Swanee's time to file a petition for a writ of certiorari in the above entitled matter to and including December 29, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

There is presented herein a question of the construction and application of Section 2(d) of the Clayton Act, which has not heretofore been passed upon by this Court, *viz.*, the scope of an order in a Section 2(d) case. The Commission's order was in the words of the statute. The decree of the court below was limited to payments made by the petitioner, as seller, to a third party (as distinguished from payments made to its customer) where such

* "Cir. A." references are to the Appendix of Swanee in the court below.

payments constituted a benefit to seller's customer in consideration for services received by seller from said customer. However, the form of the order does not except practices that do not violate Section 2(d). The petitioner is entitled to know, in language as specific as possible, what its duties are, so that it can conduct its business accordingly without the ever present possibility of unintended contempts.

Statute Involved

Section 2(d) of the Clayton Act, 38 Stat. 730, 15 U. S. C. §13, as amended by the Robinson-Patman Act, 49 Stat. 1526-1527, 15 U. S. C. §13 reads as follows:

> "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Statement of the Case

The entire record of this proceeding consists of documents and incontroverted facts which were stipulated by the parties, and are substantially as follows: Swanee is a manufacturer of paper products, including facial and toilet tissues, towels and napkins. In 1952 Swanee entered into a contract for the purchase of advertising time on a giant "spectacular" illuminated advertising sign owned and

operated by Douglas Leigh, Inc., and located in Times Square, New York. The sign contained space for stationary displays and, in addition, a unique feature consisting of a separate panel known in the trade as an Epok Panel on which animated cartoons and animated advertisements were shown. Swanee agreed to pay to Leigh $1,000 a month for three one-minute animated advertisements per hour on the animated panel (Cir. A. p. 10a). Swanee did not rent the stationary display space, which was above and alongside the animated panel. A number of other advertisers also contracted for time on the animated panel (Cir. A. p. 12a).

The stationary parts of the sign had previously been leased by Grand Union for a display of Grand Union advertising (Cir. A. 12a). As consideration for this space furnished by Leigh, Grand Union had agreed to secure for Leigh at least fifteen users of the animated panel who would pay Leigh $1,000 per month each, a total of $180,000 per year, to use the animated panel for their own advertising (Cir. A. pp. 63a-69a). Later, the number of advertisers to be secured by Grand Union was increased to twenty, and Leigh agreed to pay Grand Union a commission for its services equal to 5% of the fees received by Leigh from the first fifteen advertisers plus all of the fees from the last five (Cir. A. 70a-71a). Under this arrangement, Leigh would receive annual income of $171,000. In connection with its full-time interest in the stationary parts of the sign, Grand Union contracted with Leigh that Grand Union should have the right to approve all of the advertising messages appearing on the animated panel (Cir. A. pp. 53a-57a).

The foregoing arrangements between Grand Union and Leigh were made without Swanee's prior commitment, authorization or agreement (Cir. A. p. 12a). Swanee had no knowledge of the terms of the arrangements except as reflected in the 1952 contract between Swanee and Leigh (*ibid*). The only references in said contract to the arrange-

ments between Grand Union and Leigh are (1) that Grand Union had leased the sign from Leigh (but no mention is made of the terms of the lease, (2) that Grand Union had undertaken to secure fifteen advertisers to contract with Leigh for advertising on the animated portion of the sign, and (3) that the advertising copy to be used by Swanee was to be approved by Grand Union. Specifically, there is nothing in said contract which informs or even suggests that Grand Union was not to pay for the advertising services it received in cash at the full rates, or that Leigh was to pay Grand Union a commission for securing users of the animated panel.

Swanee had no contractual arrangements of any kind with Grand Union concerning any of the above matters, and Grand Union was not obligated to render any services or facilities to Swanee. In carrying out its undertaking to secure participants for Leigh, Grand Union did have discussions with Swanee concerning the latter's participation on the sign (Cir. A. p. 14a). As part of these discussions, a schedule of in-store promotions was arranged by Grand Union to tie in with Swanee's use of the sign (*ibid*). There is, however, no evidence contained in the stipulated facts or otherwise that Swanee was induced to enter into its contract with Leigh by these promotions or by any consideration flowing from Grand Union, nor is there evidence that the in-store promotions were furnished to Swanee in consideration of Swanee's contracting with Leigh.

All of the money due under Swanee's contract for the use of the animated sign was paid to Leigh (Cir. A. p. 11a). It was paid in the same manner followed by Swanee with respect to all the advertising media it used, namely, by Swanee paying its advertising agency and the agency transmitting the payment to the media (*ibid*). In the judgment of Swanee's officials, the advertising benefits derived from the sign were fully worth the payments of $1,000 per month therefor (Cir. A. p. 11a). Swanee made

no payments of any kind to Grand Union. Nothing was contained on the whole sign, including the Epok Panel, to convey the message to the public that the products advertised on the separate Epok Panel could be purchased anywhere, including at Grand Union (Cir. A. p. 12a). Actually several users of the Epok Panel did not manufacture or sell products in any grocery store, including Grand Union (Cir. A. p. 12a).

Swanee's use of the Leigh sign ceased permanently as of December 31, 1956, ten months prior to the filing of the complaint herein (Cir. A., p. 11a).

The Federal Trade Commission commenced proceedings against Swanee under Section 11 of the Clayton Act (15 U. S. C., Section 21) charging that Swanee had violated Section 2(d) of the Clayton Act. Swanee invoked the jurisdiction of the court below to appeal from an order of the Federal Trade Commission dated March 22, 1960 (Cir. A., p. 48a) denying the appeal by Swanee from and affirming an initial decision of its Hearing Examiner (Cir. A., pp. 19a through 47a) ordering Swanee to cease and desist from certain practices which were held to violate Section 2(d). The court below in its opinion (A1-A10) affirmed the decision of the Commission that a violation of Section 2(d) occurred under the stipulated facts, but held that the order of the Commission must be modified so as to "be limited to the particular practice found to violate the statute". On the direction of the court below, pursuant to Rule 13 (1) of the Rules of the U. S. Court of Appeals for the Second Circuit, the Federal Trade Commission filed a proposed decree alleged to be in conformity with said court's opinion (A11-A13). Swanee, objecting to said proposed decree, filed its own proposed decree (A14-A15) which it deemed to be in conformity with the opinion of the court. On the basis of said proposed decrees, the Court of Appeals then entered its final decree (A23-A25).

Reasons for Granting the Writ

I

The order below deals with Section 2(d) of the Clayton Act which this Court has recognized as an important section of this statute (*cf. F. T. C.* v. *Simplicity Pattern Company*, 360 U. S. 55, 58 [1959]). Except for the decision below and that in *P. Lorillard Company* v. *Federal Trade Commission*, 267 F. 2d 439 (3rd Cir. 1959), cert. den. —— U. S. ——, all of the court cases in which Sec. 2(d) was involved dealt with payments made directly to a customer* (as distinguished from indirect payments, as in the instant case) for services rendered or performed by the customer for the seller. Both *Lorillard* and the instant case involved payments made by the seller to a third party where it was held, under 2(d), that such payments constituted an illegal benefit to seller's customer in consideration for services received by seller from said customer.

Since the order below is not limited to the particular fact pattern involved in the record herein but extends to all transactions where a seller's payments are made to a

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* See *Oliver Bros.* v. *Federal Trade Commission*, 102 F. 2d 763 (4th Cir. 1939); *Shatz's Inc.* v. *Wilson-Jones Co.*, 105 F. 2d 331, 333 (3d Cir. 1939); *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 677 (3d Cir. 1939) (quoting the language from the *Oliver Bros.* case, *supra*); *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607, 611 (4th Cir. 1945); *Ludwig* v. *American Greetings Corporation*, 264 F. 2d 286, 288 (6th Cir. 1959); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626, 649 (E. D. Ill. 1946); *Russellville Canning Co.* v. *American Can Co.*, 87 F. Supp. 484, 499 (W. D. Ark., Ft. Sm. Div. 1949), reversed 191 F. 2d 38 (8th Cir. 1951); *Baysoy* v. *Jessop Steel Co.*, 90 F. Supp. 303, 305-306 (W. D. Pa. 1950) (quoting at p. 306, the *Southgate* case, *supra*); *United Cigar-Whelan Stores Corp.* v. *H. Weinreich Co.*, 107 F. Supp. 89, 91 (S. D. N. Y. 1952); *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, 474 (N. D. Ill., E. D. 1957), modified 258 F. 2d 831 (7th Cir. 1958), *cert. denied* 358 U. S. 947 (1959).

third party (as distinguished from payments made to its customer) this Court should assume jurisdiction so that an appropriately limited order under Sec. 2(d) may be approved by this Court for the first time to govern this case as well as all other similar cases under section 2(d). The parties are entitled to an order "as specific as possible not only in the core of its relief, but in its outward limits, so that the parties may know their duties and unintended contempts may not occur" (*International Salt Company v. United States*, 332 U. S. 392, 400 [1947]).

The Circuit Court's opinion directed that the Commission's order couched in the actual language of Section 2(d) should be limited to the particular practice found to violate the statute (A10). Although the Circuit Court's opinion directed the Commission to prepare a specific order pursuant to Rule 13(1) of the Second Circuit Court rules (*ibid*) the Commission still insisted upon submitting the same broad order except for some minor omissions that were not applicable to Swanee's business (A11-A13). Although the court below in its final decree formulated an order limited to payments made to a third party where the benefits therefrom are received by the customer, said order is still too broad and ambiguous, since it does not except practices which do not violate the statute. For example, the court below recognized that "there may be situations where payments by a supplier to a third person indirectly benefited the customer of the supplier and yet are not 'for the benefit' of the supplier within the meaning of Sec. 2(d)" (A6).*

* The opinion of the court below affirmed (see footnote 2 [A-6]) that the supposititious case contained in *Lorillard*, 267 F. 2d 439, 448, was not a violation of the statute even though the payments by the supplier might result in an indirect benefit to the buyer. Substituting the parties in the instant case for the parties in said supposititious case, such factual pattern in *Lorillard* would read as follows: Carried to its logical limit, the order below means that if Leigh, the common supplier of Swanee and Grand Union, *without prearrangement with Swanee*, grants Grand Union terms more favorable than Leigh has granted other customers of Swanee, Swanee must stop dealing with Leigh, give proportionately equal "benefits" to all of its other customers, or be adjudged guilty of Clayton Act discrimination. (Italics ours.)

The court below distinguished such indirect benefit received by the customer from the facts of the instant case by stating that in the instant case "the benefit is wholly dependent upon the payment, and the customer is one of the moving and essential parties to the entire transaction" (A6). The order below should have integrated such conceded basic exceptions which would not constitute a violation of the statute. Since the order below was not limited to enjoining the continuation of the transactions contained in the record herein but extends to all transactions where Swanee pays a third party and the benefit thereof is received by Swanee's customer, it is necessary to integrate any exceptions or limitations therein so that unintended contempts may not occur.

Moreover, both the order and opinion below improperly failed to pass upon Swanee's argument (*infra*, p. 12) that there cannot be a violation of 2(d) unless Swanee *knew* both that its customer received a benefit from Swanee's payment to the third party and that services were received by Swanee from its customer in consideration for such benefit. The court below, as in *Lorillard*, refused to pass upon this question of knowledge because in each case the court found that the seller had such knowledge (A6-A7). Since the order is broader than the actual transactions in this record, Swanee is entitled to require that the order state whether or not such knowledge be necessary before it will be held in contempt thereunder.

Unless the order is further limited as above indicated, Swanee may be prevented or prejudiced in interposing the aforesaid defenses and exceptions in a proceeding or action to punish for contempt. If the injunction order be deemed not ambiguous, it will be enforced and a violator held in civil contempt (15 U. S. C. A. §21[1]): (a) even though broader in scope than intended* (*NLRB* v. *American Mfg.*

* Thus it could be successfully argued that the order herein must be obeyed even though broader than evidenced by the Circuit Court's opinion.

Co., 132 F. 2d 740 [5th Cir. 1948] cert. den. 319 U. S. 743); (b) even though erroneous (*United States* v. *Mine Workers*, 330 U. S. 258 [1947]); and (c) irrespective of the violator's intent or motive (*McComb* v. *Jacksonville Paper Company*, 336 U. S. 187, 191 [1948]).

On the other hand, it has been held that in determining whether there be a violation, an order will not be expanded by implication beyond the meaning of its terms when considered in light of the issues and the purpose for which the action was brought. (*Terminal R. R. Assoc.* v. *United States*, 266 U. S. 17 [1924].) In the light of this rule of construction it may be that the opinion of the court below, with its express exceptions and undecided matters will be considered in construing the order.

Rather than leave Swanee and the courts to decide which of these conflicting rules of interpretation should be adopted in contempt proceedings, the order should integrate the apparent exceptions and conditions precedent to a contempt "so that the parties may know their duties and unintended contempts may not occur" (*International Salt Co.* v. *U. S.*, *supra*, at p. 400). Moreover, in the absence of findings, as in the instant case, demonstrating affirmative reasons to warrant broad injunctions, a limited order is proper. (*N. L. R. B.* v. *Ochoa Fertilizer Corp.* [U. S. Sup. Ct. Dec. 18, 1961] 30 L. W. 4090.)

A more limited and specific order should particularly be made in the instant case, wherein the court below conceded that nothing "indicates flagrant or extensive violations of Section 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed" (A9); see also *United States* v. *Gypsum Company*, 340 U. S. 76, 89 (1950).

Another important consideration necessitating a more limited and specific order is the 1959 amendment of the Clayton Act (15 U. S. C. 21), applicable to the instant case, whereunder, as stated by the court below (A10),

the "duty of enforcing the prohibitions of §2(d) as to Swanee is shifted from the Commission to the federal courts which may in the future be forced to decide the very issues that Congress has instructed the Commission to determine. See *F. T. C.* v. *Morton Salt Company*, 334 U. S. 37 (1948)". The new method of enforcement provided for thereunder is a two-stage, instead of the previous three-stage, procedure, so that now a violation of the injunction order (obtained as the first stage) could subject petitioner to a fine in an amount up to $5,000 for each day's violation to be recovered in a civil action. Therefore, in light of the severity of this penalty, the order should be as specific as possible so that the parties may know their duties and unintended contempts may not occur.

The question presented by this petition transcends the interests of the parties herein. It is of great moment and interest to the entire business community to obtain a decision by the Supreme Court defining the limits of conduct prohibited by the broad and ambiguous language of Section 2(d).

II

For the reasons heretofore stated (*supra*, part I) the order below should have provided that no violation thereof occurs unless Swanee pays consideration to and receives services from a third party, with *knowledge* both that a customer of Swanee will receive a benefit from such payment and that services were received by Swanee from this customer in consideration for such benefit. It is of extreme importance that the order be so limited as the Commission has argued below, and may claim similarly in a contempt action upon this order, that Swanee may be held to violate the statute even in the absence of proof of such knowledge. Since Swanee's payments to a third party may indirectly benefit Swanee's customer but concededly (*supra*, p. 8) not be a violation of Section 2(d), the additional fact which may result in a violation is that Swanee has such knowledge of the transactions resulting in mutual improper benefit to itself and its customer. A court cannot assume Swanee's or any other seller's knowledge of transactions between a third party and a customer of such seller. To impose liability without proof of such knowledge would make the Clayton Act a trap for the innocent.

If the seller has knowledge of the transaction between the third party and the customer, it may be liable under Section 2(d), irrespective of its motive or intention, if the transaction be deemed in violation of said statute (*P. Lorillard Co.* v. *F. T. C.*, *supra* at 444). Thus, motive and intention are different from knowledge. In *Lorillard* (p. 444), as in the instant case, the courts omitted to decide whether such knowledge was necessary because of a finding that the seller had knowledge of the facts which resulted in a violation of the statute. However, since the order below is not limited to the facts contained in this record, Swanee is entitled to have the order specify whether such knowledge be a condition precedent to a violation thereof.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 161—October Term, 1960.

(Argued January 12, 1961 Decided June 22, 1961.)

Docket No. 26311

SWANEE PAPER CORPORATION,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

Before:

CLARK, MAGRUDER and MOORE, *Circuit Judges.*

Petition to review an order of the Federal Trade Commission issued after proceedings in which petitioner was found to have violated Section 2(d) of the Clayton Act, as amended, 15 U. S. C. 13(d).

Affirmed. Order to be entered in conformity with this opinion.

ARNOLD A. JAFFE (Moses & Singer, Joseph L. Fishman, on the brief), *for petitioner.*

E. K. ELKINS, Attorney, Federal Trade Commission (PGad B. Morehouse, Acting General Counsel, Alan B. Hobbes, Assistant General Counsel, Federal Trade Commission, on the brief), *for respondent.*

Appendix

MOORE, *Circuit Judge*:

Petitioner, Swanee Paper Corporation (Swanee), seeks to review a cease and desist order issued by the Federal Trade Commission (Commission) after proceedings in which Swanee was found to have violated Section 2(d) of the Clayton Act, as amended, 15 U. S. C. §13(d).[1] These proceedings were conducted upon a stipulation of facts with annexed exhibits which were submitted by the parties to the hearing examiner.

The dispute arose out of a series of arrangements involving Swanee, a manufacturer of paper products; The Grand Union Company (Grand Union), a customer of Swanee operating a number of retail food stores; and Douglas Leigh, Inc. (Leigh), the owner and operator of a "spectacular" advertising sign located in the Times Square area of New York City. This sign contained panels for stationary displays, and a panel (known as the "Epok Panel") which consisted of a bank of timed electric lamps against a black background, used for projection and display of animated advertisements.

On August 6, 1952, Grand Union accepted a proposal by Leigh offering "the use and occupancy of our combined electric spectacular and animated display located at 1552-1554 Broadway." In return, Grand Union agreed to pay to

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1. This section provides:

> "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Leigh $50.00 and to secure "the agreement and consents of fifteen (15) participating advertisers to use the south panel animated part of the display * * * for advertising on this display." These "participating advertisers" each were to pay Leigh $1,000 per month for the use of the Epok Panel for seventy-five per cent of its operating time. The remaining twenty-five per cent was reserved for advertising of Grand Union or its designates; one stationary panel was to be used for advertising by Grand Union; and the remaining space was to be developed in accordance with layout and copy plans prepared by Leigh for the approval of Grand Union. No design, layout or copy could be used on any portion of the display without the approval in writing by Grand Union. The term of the agreement was one year with Grand Union having the option to renew for two additional one-year periods. On August 20, 1953, the agreement was renewed and modified to the extent of increasing the number of participating advertisers from 15 to 20, eliminating Grand Union's twenty-five per cent participation on the Epok Panel, and requiring the payment to Grand Union of five per cent of the monthly rental paid by the first 15 participating advertisers and all of the rentals paid by the additional 5 participants. On December 13, 1954, the agreement was again renewed and Grand Union was given an option to renew, one year at a time, through 1960.

Following conferences, conversations and correspondence between its representatives and those of Grand Union and Leigh, Swanee, on July 30, 1952, agreed in writing with Leigh to become one of the participating advertisers on the Epok Panel. This contract recited that Swanee "agrees to undertake participation in the Advertising Service arranged for and to be rendered to the Grand Union Company by Douglas Leigh, Inc."; that Grand Union had

leased the sign from Leigh; that the contract would become null and void in the event that Grand Union did not secure 15 signed contracts from participating advertisers; that each such advertiser would be entitled to display its copy on the Epok Panel for one minute during each twenty minutes of operation; that all advertising copy used by Swanee was to be approved by Grand Union; and that Swanee would pay to Leigh $1,000 per month "for full service rendered under this Agreement by Douglas Leigh, Inc." As part of the discussions with Grand Union concerning the above agreement, a schedule of in-store promotions of Swanee's products was arranged with Grand Union to tie in with the use of the sign. No separate payments were made by Swanee for these promotions.

In November, 1953, Frederick Gash, Swanee's broker, wrote letters to Swanee and Grand Union in which he analyzed the results of Swanee's participation in the "Broadway Sign deal." He reported that Grand Union "is the costliest account that * * * [Swanee] had on its books"; that the account "is too costly for the amount of business" being done; and that Swanee's purpose "should be *not* to cut down on the amount of money being appropriated for this account, but to find a solution so that we can do sufficient business to justify the expense."

About a month later, Swanee advised Leigh that it did not intend to renew its participation in the sign deal, and Leigh, in notifying Grand Union of this, suggested that the latter might be successful "in securing a reversal of this decision." After discussions with Leigh and Grand Union, Swanee, on February 16, 1954, renewed its participation for another year. In 1955 Swanee notified Grand Union that, " 'because of pressure from other concerns' including customers of * * * [Swanee] competing with Grand Union, it would be unable to renew its participation on

the sign." However, following further discussions with Leigh and Grand Union, Swanee, in February, 1956, executed a new agreement. This contract differed from the earlier one in that all references to Grand Union were omitted, as were the provisions stating that Grand Union had leased the sign, that all copy was to be approved by Grand Union, and that the agreement was conditioned upon Grand Union's securing contracts from participating advertisers. Swanee's participation was canceled on December 31, 1956, and has never been renewed since that date. On November 6, 1957, these proceedings were commenced.

Section 2(d) of the Clayton Act makes it unlawful for a supplier, in the course of commerce, to pay anything of value "to or for the benefit of a customer * * * as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the * * * sale, or offering for sale * * *" of the supplier's products, "unless such payment or consideration is available on proportionally equal terms to all other * * *" competing customers of the supplier. There being no dispute that the payments made by Swanee to Leigh were not available on a "proportionally equal" basis to other customers of Swanee, the crucial questions on this appeal are whether the record as a whole supports the Commission's conclusions that the payments were "for the benefit" of Grand Union, and that these payments were made in consideration of services rendered to Swanee "by or through" Grand Union.

Although the payments by Swanee were not made directly to Grand Union, it is clear that they were "for the benefit" of that company, within the meaning of Section 2(d). As the hearing examiner found, these benefits included valuable advertising space on the sign at a nominal cost, valuable advertising in other media in exchange for

Grand Union's right to a twenty-five per cent participation on the Epok Panel, and cash payments totaling $14,633.28. And Grand Union's right to these benefits was not unqualified, but was entirely dependent upon the willingness of Swanee and other suppliers to become participating advertisers. That Leigh and Swanee also benefited from these payments does not make the benefit to Grand Union any the less. There may be situations where payments by a supplier to a third person indirectly benefit a customer of the supplier and yet are not "for the benefit" of the supplier within the meaning of Section 2(d).[2] Such is not the case where, as here, the benefit is wholly dependent upon the payment, and the customer is one of the moving and essential parties to the entire transaction.

Swanee urges that no Section 2(d) violation can exist here since it did not have knowledge that Grand Union was benefiting from the payments, and without such knowledge its acts were lawful. We need not decide the latter question, for the record fully supports the Commission's conclusion that Swanee knew or should have known that it was benefiting Grand Union. It is true that the parties have stipulated that Swanee had no knowledge of the terms of the arrangement between Leigh and Grand Union except as reflected in the 1952 contract between Leigh and Swanee; it may also be true that Swanee did not know the exact terms of the Grand Union-Leigh contract. It did know, however, that Grand Union had leased the entire sign, that all advertising thereon was subject to the approval of Grand Union, and that the success of the Epok Panel arrangement was dependent upon Grand Union's ability to secure participating advertisers. It was also fully aware that the sign was being referred to as a "Grand Union sign," and a "new cooperative outdoor advertising

2 See *P. Lorillard Company* v. *FTC*, 3 Cir., 1959, 267 F. 2d 438, 448 (dissenting opinion).

program"; certainly the sign's appearance cried out that it was a Grand Union sign. When Swanee concluded that its "Grand Union account" was too costly, it decided to attempt to increase its business with that company rather than cut down on the money appropriated to the account. This permits of an inference that Swanee considered that it was conferring benefits upon its customer for which it was not being fully compensated. Finally, the deletion of all references to Grand Union in the 1955 renewal contract between Leigh and Swanee—executed only a short time after Swanee had complained of pressures from its other customers—supports the view that Swanee was not totally unaware of the legal significance of the arrangement.

Turning to the question as to whether the payments by Swanee were made in consideration of services or facilities rendered "by or through" Grand Union, the Commission's conclusion that they were so made is fully supported by the record. There is no dispute that Swanee received valuable advertising in consideration for the payments. And it is clear that these facilities were furnished by Grand Union since it had leased the entire sign from Leigh and had the right to select the participating advertisers. Also, as part of the arrangement, in-store promotions of Swanee's products were provided by Grand Union. That Grand Union was not bound by contract to supply these promotions is not determinative, the crucial question being what actually was supplied. See *P. Lorillard Company* v. *FTC*, 3 Cir., 1959, 267 F. 2d 439, cert. denied 361 U. S. 923.

3. On November 28, 1952, Grand Union issued a press release announcing a "new venture in cooperative advertising [illegible] promote Grand Union and 15 different food products." And on January, 1953 Swanee received a copy of a brochure prepared by Leigh without Swanee's authority, referring to the sign as a "Grand Union Spectacular and containing reprints of a number of newspaper ads which referred to the sign as a Grand Union Sign" or as a part of a "new cooperative outdoor advertising program."

Appendix

The Commission was justified in relying on *P. Lorillard Company* v. *FTC*, *supra* (referred to as the *Chain Lightning* case), where the Third Circuit upheld a finding of a Section 2(d) violation arising out of a series of transactions not dissimilar from that found here. In *Chain Lightning* certain grocery chains signed contracts with various broadcasting networks whereby the chains were given "free" broadcasting time in consideration of promises to furnish in-store promotional displays of various products. The products were not named in the contracts, the broadcasting companies agreeing to proffer suggestions at a later date with the chains reserving the right to decline to promote unsuitable products. Following the negotiations of these contracts, the networks solicited suppliers of the chains to purchase radio or television time, and to induce such purchases, offered promotions of the suppliers' products in the stores of the retail chains. The Commission held that the entire arrangement was part of a plan whereby the supplier's payments to the networks provided the chains with "free" advertising, and were partially made in return for the in-store promotions. Swanee's attempt to distinguish *Chain Lightning* is not persuasive. In fact, although we consider it unnecessary to approve or disapprove of that decision, it can be said that the Commission's case here is, in many respects, in a stronger position on its facts than it was there. In *Chain Lightning* the "execution of the agreements by • • • [the supplier] was not a contingency upon which the right of the chains to air time depended," the latter's right thereto being "fixed, immediate and unqualified" (267 F. 2d 446 (dissenting opinion)). Here, however, Grand Union's right to advertise on the sign pursuant to its contract with Leigh was wholly conditioned upon the willingness of its suppliers to become participating advertisers. And in *Chain Lightning* the consideration received by the supplier only partially and indirectly flowed from the customer, the right to air time being supplied by the networks and available with

or without the added inducement of in-store promotions. Here, however, Swanee's right to advertising space and even its choice of copy was entirely subject to the approval of Grand Union.

Although the Commission's finding of a Section 2(d) violation is supported by the record, the breadth of the order issued is not justified by the facts. Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future (e.g., *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385 (1959), but there must be some relation between the facts found and the breadth of the order. (*FTC* v. *Mandel Brothers, Inc., supra*; *FTC* v. *National Lead Co.*, 352 U. S. 419 (1957); *NLRB* v. *Express Pub. Co.*, 312 U. S. 426 (1941); *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217 (1949)).[4] Nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed. Moreover, the order is not even limited to related activities but enjoins Swanee from violating Section 2(d) in the very words of the statute. As the Supreme Court stated in *NLRB* v. *Express Pub. Co., supra*:

> "The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." (*Id.* at 435.)

4 See also 2 U. S. Cong. & Admin. News, p. 1807 (1958), where the report of the House Committee which studied the recent enforcement provision of the Clayton Act, 15 U. S. C. § 21, stated that the Commission should "make a continuous effort to issue orders that are as definitive as possible" and that deficiencies in this regard may be corrected by judicial review.

It is true that Swanee did not object to the order during the proceedings below and that orderly appellate review of administrative decisions usually requires that such objections be made. See *United States* v. *Tucker Truck Lines*, 344 U. S. 33 (1952). Swanee did object to the order, however, in its petition to review, and at the time this was filed, the Commission could have modified its order if it had so wished. See 15 U. S. C. §21(b). Moreover, the order as written is so broad that, under the new enforcement provisions of the Clayton Act (15 U. S. C. §21), the duty of enforcing the prohibitions of Section 2(d) as to Swanee is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine. See *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948). Proper judicial administration requires that the order be modified,[5] and we therefore hold that the order should be limited to the particular practice found to violate the statute.

The decision of the Commission is affirmed; an order shall be entered in conformity with this opinion, pursuant to Rule 13(1), Rules of the United States Court of Appeals for the Second Circuit, which provides that the Commission "shall within 10 days serve upon the • • • [petitioner] and file with the clerk a proposed decree in conformity with the opinion," and that if petitioner "objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon • • • [the Commission] and file with the clerk a proposed decree which he deems to be in conformity with the opinion."

5. See *NLRB* v. *Express Co.*, *supra*, where the Supreme Court modified an NLRB order notwithstanding the failure of the party affected thereby to object. See also *NLRB* v. *Ochoa Fertilizer Corp.*, 1 Cir., 1960, 283 F. 2d 20 (cert. granted 29 U. S. Law Week 3262, March 6, 1961); *FTC* v. *Henry Broch Co.*, 7 Cir., 1960, 285 F. 2d 764 (1960) (cert. granted 29 U. S. Law Week 3344 (May 16, 1961)).

Appendix

Proposed Final Decree of Federal Trade Commission

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26311

SWANEE PAPER CORPORATION, a corporation,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING, ORDER TO CEASE AND DESIST

Swanee Paper Corporation, a corporation, petitioner herein, having filed in this Court on May 31, 1960, a petition to review and set aside an order to cease and desist issued against it on March 22, 1960, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Swanee Paper Corporation, a corporation, Docket No. 6927;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein a transcript of the entire

record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 12, 1961, and this Court having rendered its decision on June 22, 1961, holding that the aforesaid order to cease and desist "should be limited to the particular practice found to violate the statute;"

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

"IT IS ORDERED that respondent Swanee Paper Corporation, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in connection with the sale or offering for sale in commerce (as 'commerce' is defined in the Clayton Act) of paper products, do forthwith cease and desist from:

> Paying or contracting to pay, to or for the benefit of any customer anything of value as compensation or in consideration for any advertising or promotional display services or facilities furnished to or for the benefit of respondent by or through such customer in connection with the sale or offering for sale of respondent's paper products, unless such payment or consideration is made available by respondent on proportionally equal terms to all other customers of respondent competing in the sale or offering for sale of such products of respondent with the customer to whom or for whose benefit such payment or contract to pay is made."

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the order as thus modified be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commended forthwith to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist as hereby modified.

Without prejudice to the right of the United States, as provided in Section 5(l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the said order to cease and desist as hereby modified, and, as modified, affirmed and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

In submitting the foregoing proposed decree the Commission does not thereby concede that its administrative order was erroneous or acquiesce in the Court's consideration of petitioner's objections thereto, nor does it waive any right to seek further review of the Court's judgment herein or any decree which may be entered.

Respectfully submitted.

s James McI. Henderson
James McI. Henderson,
General Counsel,

s Alan B. Hobbes
Alan B. Hobbes,
Assistant General Counsel,

s E. K. Elkins
E. K. Elkins,
Attorney,

Attorneys for the Federal Trade Commission.

Dated at: Washington, D. C.,
July 21, 1961.

Appendix

Proposed Final Decree of Swanee Paper Corporation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26311

SWANEE PAPER CORPORATION,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

PROPOSED FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING, ORDER TO CEASE AND DESIST

Swanee Paper Corporation, a corporation, petitioner herein (hereinafter sometimes referred to as "Swanee"), having filed in this Court on May 31, 1960, a petition to review and set aside an order to cease and desist issued against it on March 22, 1960, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Swanee Paper Corporation, a corporation, Docket No. 6927;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on

January 12, 1961, and this Court having rendered its decision on June 22, 1961, holding that the aforesaid order to cease and desist "should be limited to the particular practice found to violate the statute;"

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order be, and it hereby is modified to read as follows:

> "IT IS ORDERED that respondent Swanee Paper Corporation, a corporation, its officers, employees, agents or representatives, in connection with the sale or offering for sale in commerce (as 'commerce' is defined in the Clayton Act) of paper products, do forthwith cease and desist from:
>
> Paying or contracting to pay to or for the benefit of Grand Union Company, or any other customer of Swanee, anything of value by participating in and making rental payments to the owner and operator of an advertising sign leased and controlled by such customer, whether paid directly to Swanee's customer or to another person with knowledge that such payment is for the benefit of such customer as compensation or in consideration for services or facilities furnished it by any such customer of Swanee in connection with the sale, or offering for sale of Swanee's products, unless such payment or consideration is made available on proportionally equal terms to all other customers of Swanee competing in the distribution of such products."

_____

_____

_____

United States Circuit Judges

Dated:

Appendix

Final Decree of the Court Below

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26311

SWANEE PAPER CORPORATION, a corporation,
Petitioner.

v.

FEDERAL TRADE COMMISSION,
Respondent.

FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING, ORDER TO CEASE AND DESIST

Swanee Paper Corporation, a corporation, petitioner herein, having filed in this Court on May 31, 1960, a petition to review and set aside an order to cease and desist issued against it on March 22, 1960, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Swanee Paper Corporation, a corporation, Docket No. 6927;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on

January 12, 1961, and this Court having rendered its decision on June 22, 1961, holding that the aforesaid order to cease and desist "should be limited to the particular practice found to violate the statute;"

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

> "IT IS ORDERED that respondent Swanee Paper Corporation, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in connection with the sale or offering for sale in commerce (as 'commerce' is defined in the Clayton Act) of paper products, do forthwith cease and desist from:
>
> Paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising or promotional display services or facilities furnished to or for the benefit of respondent by or through such customer in connection with the sale or offering for sale of respondent's paper products, unless such payment or consideration is made available by respondent on proportionally equal terms to all other customers of respondent competing in the sale or offering for sale of such products of respondent with the customer to whom or for whose benefit such payment or contract to pay is made."

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the order as thus modified be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree peti-

tioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist as hereby modified.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the said order to cease and desist as hereby modified, and, as modified, affirmed and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

/s/ CHARLES E. CLARK
/s/ LEONARD P. MOORE
United States Circuit Judges

Dated: August 3, 1961

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626530—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 640

SWANEE PAPER CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A10) is reported at 291 F. 2d 833. The initial decision of the hearing examiner and the decision of the Federal Trade Commission adopting the initial decision (Cir. A. 19a–48a) [1] are not yet officially reported.

JURISDICTION

The final decree of the court of appeals was entered on August 3, 1961. Because of material errors in the version set forth in the Appendix to the petition at pp. A16–A18, the actual decree is printed in the Appendix hereto, *infra*, pp. 11–12. By order of Mr. Justice Harlan, the time for filing a petition for a writ

[1] This brief will follow petitioner's use of "Cir. A." to refer to the Appendix for Petitioner in the court of appeals.

of certiorari was extended from November 1, 1961, to December 29, 1961. The petition was filed on December 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a cease-and-desist order issued by the Federal Trade Commission, which was modified by the reviewing court despite petitioner's failure to challenge its breadth before the agency, should be modified further.

STATUTE INVOLVED

Section 2(d) of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 13(d), is printed in the petition at p. 3.

STATEMENT

In August 1952, Douglas Leigh, Inc., the owner and operator of an illuminated advertising sign located on the roof of a building in the Times Square area of New York City, entered into an agreement with the Grand Union Company in which Grand Union agreed to pay Leigh a nominal sum of $50 and to secure the agreements of fifteen participating advertisers to pay Leigh $1,000 each for use of a particular panel of the sign. Grand Union in turn was given the right to use the other portions of the sign for its own advertising and to veto all advertising messages on any part of the sign. Later, Grand Union was also given a share of the monthly rentals. (Cir. A. 22a–26a.)

The participating advertisers, whose agreements Grand Union secured, were all enterprises whose products were sold in Grand Union stores (Cir. A.

31a–32a).[2] Petitioner, a manufacturer of paper products, entered into a contract to become one of Grand Union's participating advertisers (Cir. A. 24a). A schedule of in-store promotions of petitioner's products was also arranged with Grand Union to tie in with the use of the sign, although no separate payments were made by petitioner for these promotions (Cir. A. 34a, 44a).

In 1955, petitioner stated its intention not to renew its participation "because of pressure from other concerns," including customers of petitioner who were in competition with Grand Union. Following discussions with Leigh and Grand Union, however, petitioner renewed its participation. The renewal agreement differed from its earlier agreements with Leigh in that all references to Grand Union were omitted (Cir. A. 26a–31a). On December 31, 1956, after the Commission had begun its investigation of the practice, petitioner finally canceled its participation in the use of the sign (Cir. A. 32a, 46a).

The examiner found that the deletion from petitioner's renewed contract of references in the earlier contracts "which tended to identify the sign as a Grand Union sign and pointed up the cooperative nature of

[2] Petitioner's statement (Pet. 6) that "several users of the [sign] did not manufacture or sell products in any grocery store, including Grand Union," is misleading. The users to which petitioner refers were not participating advertisers who paid monthly rentals to Leigh under the arrangement worked out between Leigh and Grand Union, but were television stations and a newspaper to whom Grand Union traded a portion of its advertising time on the sign in exchange for time and space in these media (Cir. A. 33a–34a).

the arrangement" was "indicative of an intent to cover up * * *" (Cir. A. 42a). The examiner further found that "the idea of splitting the arrangement into two separate groups of contracts" came about because, if "a single contract [had] been entered into among all parties, the nature of the arrangement as a cooperative advertising venture * * * would have been revealed * * *" (Cir. A. 45a).

After full hearing, the examiner concluded that petitioner had violated Section 2(d) of the Clayton Act by making discriminatory payments to Grand Union over a period of years. Although he believed that petitioner's knowledge and intent were probably irrelevant to a determination that it had violated the statute (Cir. A. 39a–40a), the examiner expressly concluded that petitioner had in fact known that its actions benefited Grand Union at the expense of its other customers, and had intended to confer such benefits upon Grand Union (Cir. A. 40a–45a). The examiner proposed a cease-and-desist order (Cir. A. 47a), the scope of which petitioner did not challenge in its appeal to the Commission.

The Commission adopted the examiner's findings and conclusions as its own and issued the order in the form proposed by the examiner (Cir. A. 48a).

Petitioner then filed a petition for review in the court of appeals (Cir. A. 49a–52a), which for the first time raised an issue as to the breadth of the order. The court accepted the Commission's findings and agreed with the Commission that petitioner had violated Section 2(d) (Pet. App. A2–A9). It was of the view, however, that although petitioner "did not object to the order during the proceedings below," the court could

nevertheless consider the objection because it had been raised in the petition to review and because the 1959 Amendments to the Clayton Act had set up new enforcement procedures. The court held that "the order issued is not justified by the facts" and "should be limited to the particular practice found to violate the statute" (Pet. App. A9, 10).

The court required the Commission within ten days to submit a proposed decree "in conformity with the opinion" and allowed petitioner, if it disagreed, to submit its proposed decree (Pet. App. A10). Both the Commission (Pet. App. A11–A13) and petitioner (Pet. App. A14–A15) responded. The court adopted neither suggestion and formulated its own final decree modifying and, as modified, affirming the Commission's cease and desist order (App., *infra*, pp. 11–12). The pertinent part of the order is set out below. Those portions of the Commission's order deleted by the court are placed in brackets; those portions which the court added to the Commission's order are printed in italics; those portions of the Commission's order which were retained are set out in Roman type (compare Cir. A. 47a with App., *infra*, p. 12). The order directed Swanee, the petitioner, "in connection with the sale or offering for sale in commerce * * * of paper products," to cease and desist from—

> Paying or contracting to pay [to or for the benefit of any customer] anything of value *to any third person* as compensation or in consideration for any advertising[,] *or* promotional display[s or other] services or facilities *if such services or facilities are* furnished by or through [such] *any* customer *of Swanee* in con-

nection with the [handling, processing,] sale or offering for sale of [respondent's] *Swanee's* products, *and such compensation or consideration paid or contracted to be paid to said third person is used in whole or in part to provide benefits for said customer,* unless [such payment or consideration is] *the benefits thus derived by said customers are* made available on proportionately equal terms to all other customers *of Swanee* competing in the distribution of [such] *its* products.

ARGUMENT

Petitioner makes no challenge to the court's affirmance of the Commission's finding that Swanee had violated Section 2(d) of the Clayton Act by making discriminatory payments to Grand Union over a period of years. The sole question presented by the the petition is whether the court of appeals, in modifying the Commission's order by limiting its scope to the particular practice by which petitioner violated Section 2(d), erred in not still further limiting its scope to circumstances in which petitioner can be shown to have known that its payments to a third party would benefit a customer and that the services petitioner would receive in return would be in consideration of such benefit. This question presents no issue of general importance and involves no conflict between the circuits warranting review by this Court. The challenge is in any event not open to petitioner because of its failure to present the matter first to the Commission.

1. Since the Commission's order, as modified by the court of appeals, prohibited petitioner from paying a third party for advertising or display services

or facilities only where they are "furnished by or through" a customer of the petitioner in "connection with the sale or offering for sale" of petitioner's products (App., *infra*, p. 12), it is difficult to conceive of any situation falling within the prohibited course of conduct in which petitioner would not either actually know, or be in a position where it had good reason to know, that it was violating the decree. Moreover, since the court of appeals affirmed the Commission's conclusions that petitioner "knew or should have known that it was benefiting Grand Union" (Pet. App. A6) and that its deletion of all references to Grand Union in the 1955 renewal of its contract, shortly after it had complained of pressures from its other customers, "supports the [Commission's] view that Swanee was not totally unaware of the legal significance of the arrangement" (Pet. App. A7), the court certainly was not obligated to place upon the Commission the burden of proving petitioner's knowledge in any future proceedings arising out of petitioner's subsequent activities.

If knowledge were an essential element of a violation of Section 2(d)—which is doubtful [4]—and therefore of the decree, petitioner in any subsequent action would be free to show that it lacked actual or constructive knowledge of the nature of its customers' participation in the scheme. In view of the court of appeals' express statement that it intended to limit the order to "the particular practice found to violate the statute" (Pet. App. A10), the order undoubtedly would not be read "as denying * * * [petitioner] the benefit of statu-

[4] See *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F. 2d 439, 444 (C.A. 3), certiorari denied, 361 U.S. 923.

tory defenses or exceptions" (*Federal Trade Commission* v. *Henry Broch and Co.*, No. 74, this Term, decided January 15, 1962, slip. op., p. 7), including lack of knowledge if this be in fact a defense. See *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475–76; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 426. In the circumstances presented, however, the court of appeals clearly was not required to resolve the question in advance in favor of petitioner.

2. In any event, petitioner's failure to challenge the scope of the order before the Commission bars it from here contending that the order, despite the modifications made by the court of appeals, is still unduly broad. Since petitioner failed to raise any objection to the scope of the order on appeal to the Commission from the initial decision of the examiner, despite the express provision in the Commission's rules requiring it to do so (see 16 CFR (1960 ed.) 3.22), judicial modification of the order was foreclosed by the settled rule that issues not raised before an administrative agency are ordinarily not open before the reviewing court. See the Commission's brief in *Federal Trade Commission* v. *Henry Broch and Co., supra,* pp. 14–19, and cases there cited.

The court of appeals deemed the rule inapplicable and modified the order because the scope of the order was challenged in the petition to review and because the 1959 Amendments to the Clayton Act had set up new enforcement procedures. Compare *Federal Trade Commission* v. *Henry Broch and Co., supra,* slip op., pp. 5–3. We believe that the court erred in modifying the order because neither of its reasons overcomes the basic policy behind the rule that the agency should

have the initial opportunity to consider matters within its jurisdiction. And, as the dissenting Justices pointed out in the *Broch* case, *supra*, "When its attention is focused to the appropriateness of the scope of an order to restrain illegality, the Commission has shown responsible awareness of the difference in shaping its order to a situation like the one presented by this case, to wit: a specific, closely confined illegality as distinguished from a widespread illegal practice inimical to the public interest." Because we have not sought review of the court's determination, we cannot challenge the modifications of the Commission's order which the court has already made. We nevertheless believe that the rule may properly be invoked to preclude any further modifications of the scope of the order.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
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RICHARD A. SOLOMON,
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JANUARY 1962.

APPENDIX

FINAL DECREE

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 26311

SWANEE PAPER CORPORATION, A CORPORATION, PETITIONER, *v.* FEDERAL TRADE COMMISSION, RESPONDENT

FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING, ORDER TO CEASE AND DESIST

Swanee Paper Corporation, a corporation, petitioner herein, having filed in this Court on May 31, 1960, a petition to review and set aside an order to cease and desist issued against it on March 22, 1960, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Swanee Paper Corporation, a corporation, Docket No. 6927;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 12, 1961, and this Court having rendered its decision on June 22, 1961, holding that the aforesaid order to cease and desist "should be limited to the particular practice found to violate the statute;"

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondent Swanee Paper Corporation, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in connection with the sale or offering for sale in commerce (as "commerce" is defined in the Clayton Act) of paper products, do forthwith cease and desist from:

> Paying or contracting to pay anything of value to any third person as compensation or in consideration for any advertising or promotional display services or facilities if such services or facilities are furnished by or through any customer of Swanee in connection with the sale or offering for sale of Swanee's products, and such compensation or consideration paid or contracted to be paid to said third person is used in whole or in part to provide benefits for said customer, unless the benefits thus derived by said customers are made available on proportionately equal terms to all other customers of Swanee competing in the distribution of its products.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the order as thus modified be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety (90) days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist as hereby modified.

CHARLES E. CLARK,
by LPM

LEONARD P. MOORE,
United States Circuit Judges.

Dated: August 3, 1961.

U.S. GOVERNMENT PRINTING OFFICE 1963